

Decision PROPOSED DECISION OF ALJ BURCHAM (Mailed 3/4/2016)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Application of  
Vodafone U.S. Operations Inc. for a  
Certificate of Public Convenience and  
Necessity to provide Resold Interexchange  
Telecommunications Service within  
California Pursuant to the Provisions of  
Public Utilities Code Section 1001.

Application 14-01-028  
(Filed January 30, 2014)

**DECISION DENYING AS MOOT THE VODAFONE US OPERATIONS, INC.  
APPLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE  
AND NECESSITY AND IMPOSING PENALTIES  
FOR OPERATING WITHOUT AUTHORITY**

**Summary**

This decision denies as moot the application of Vodafone U.S. Operations, Inc. (Vodafone US Ops) for a Certificate of Public Convenience and Necessity (CPCN), denies Vodafone US Ops' motion for reconsideration of a ruling dismissing its motion to withdraw this Application, and imposes a financial penalty of \$16,000 pursuant to Pub. Util. Code § 2107 and 2108<sup>1</sup> for operating without authority between April 20, 2012 and November 30, 2014. This proceeding is closed.

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<sup>1</sup> All statutory references are to the Public Utilities Code unless otherwise indicated.

## 1. Discussion

On January 30, 2014, Vodafone US Ops' predecessor in interest, Cable & Wireless Americas Operations, Inc. (Cable & Wireless), initially filed its application for a CPCN to provide resold interexchange telecommunications services. Cable & Wireless previously held a CPCN (U6835C) issued by the California Public Utilities Commission (Commission). This CPCN was revoked pursuant to Resolution T-17359, issued April 20, 2012, for failure to post a performance bond and remit user fees to the Commission.

After Cable & Wireless' CPCN was revoked, the company was acquired by the Vodafone family of companies under the umbrella of Vodafone BV in Europe. Cable & Wireless was renamed Vodafone US Operations, Inc. effective April 1, 2014. The company continued in operation, providing exactly the same services as Vodafone US Ops as it had provided while operating as Cable & Wireless under CPCN (U6835C), until it ceased operations on December 1, 2014.<sup>2</sup>

A prehearing conference (PHC) was held on August 26, 2014, during which counsel for the Applicant indicated the initial application did not accurately reflect the services provided by the Applicant. The assigned Administrative Law Judge (ALJ) directed the Applicant to file an amended application which accurately reflected the services provided and all of the information necessary to satisfy the application requirements set forth in Decision (D.)13-05-035.<sup>3</sup>

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<sup>2</sup> Prehearing Conference Transcript at 8, 9

<sup>3</sup> D.13-05-035 to Rulemaking (R.) 11-11-006, issued June 3, 2013, set forth new information requirements for CPCN applications

At the PHC, counsel for the Applicant made an oral motion to withdraw this Application, arguing that Vodafone no longer needed a CPCN to operate because they offer predominately interstate data transfer services and are therefore exempt from the Commission's jurisdiction on two theories:

1. Federal Communication Commission (FCC) rules<sup>4</sup> removed Vodafone from the Commission's jurisdiction because more than 10 percent of the transmissions were interstate in nature; and
2. The services provided by Vodafone fall under the definition of IP-enabled services as defined in code section 239(a), and as such the Commission lacks jurisdiction under section 710,<sup>5</sup> which restricts the Commission's regulatory authority over Voice Over Internet Protocol (VOIP) and IP-enabled services.

Following revocation of Vodafone's CPCN, Vodafone US Ops continued to report intrastate revenue and pay user fees to the Commission for approximately two years. Only after it filed the motion to withdraw this Application did Vodafone US Ops discontinue paying user fees.

On October 29, 2014, the assigned ALJ issued a ruling denying Vodafone US Ops' motion to withdraw the application, finding Vodafone US Ops to be a public utility subject to the Commission's jurisdiction pursuant to code sections 216(a) and 234. This ruling also held that the 10 percent rule did not serve to reclassify the nature of Vodafone US Ops' business operations or remove the Commission's jurisdiction to regulate Vodafone US Ops' activities in California, and Vodafone US Ops required a CPCN for the period of time it

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<sup>4</sup> 47 CFR 136, § 154(a), referred to as "the 10 percent rule."

<sup>5</sup> Pub. Util. Code § 710, Ch. 733 Stats. 2012, effective January 1, 2013.

operated in California. On November 17, 2014, Vodafone US Ops filed a motion for reconsideration of the ALJ's ruling. By this Decision we affirm the ALJ's ruling and deny Vodafone US Ops' request for reconsideration of that ruling.

The October 29, 2014, ruling also found Vodafone US Ops to be in violation of the Commission's Order revoking Vodafone US Ops' CPCN beginning April 21, 2012.<sup>6</sup> Vodafone US Ops was directed to respond to the ALJ's finding that Vodafone US Ops could be subject to a penalty of up to \$32,450,000 under sections 2107 and 2108. On November 21, 2014, Vodafone US Ops responded to the ALJ's ruling, stating Vodafone US Ops "had zero revenues and zero income from intrastate telecommunications operations in California" based on its interpretation of the ten percent rule that all of the traffic on Vodafone US Ops' system was "jurisdictionally interstate" and as a result, all of Vodafone US Ops' revenues, expenses, taxes and reserves are allocable solely to FCC jurisdiction. Vodafone US Ops therefore contends that any monetary fine or penalty would have to be paid from its interstate resources.

## **2. CPCN Required While Operating in California**

As the ALJ ruling issued October 29, 2014, states:

Section 216(a) defines the term "public utility" to include a "telephone corporation," which in turn is defined in section 234(a) as "every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state." Vodafone provides resold interexchange service in California, primarily data transfers for large financial institutions. The fact that more than ten percent of its transmissions generated are interstate in nature,

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<sup>6</sup> Declaration of Megan Doberneck dated October 8, 2015, confirming that Vodafone U.S. Operations, Inc. was merged into Vodafone U.S., Inc. and ceased operation as of December 1, 2014.

and therefore all calls are treated as interstate for purposes of the cost allocation rules of exchange line cable and wire facilities under 47 CFR 36, § 154(a), does not reclassify the nature of Vodafone's business operations or remove this Commission's jurisdiction to regulate Vodafone's activities in California.

Vodafone US Ops needed a CPCN for the entire time it was operating in California, and was therefore operating in violation of California law beginning April 21, 2012, and ending November 30, 2014. As Vodafone US Ops ceased operation in California and was merged into another Vodafone subsidiary, Vodafone US, Inc., as of December 1, 2014, its Application for a CPCN became moot as of that date. However, as it was found Vodafone US Ops was operating without a valid CPCN, it is appropriate to address the issue of whether financial penalties are warranted.

### **3. Liability for Penalties Under Sections 2107 and 2108**

Pub. Util. Code § 2107 provides that any public utility that violates or fails to comply with any provision of the State Constitution, the Public Utilities Code, or any order, decision, decree, rule, direction, demand or requirement of the Commission, is subject to a penalty of not less than \$500 nor more than \$50,000 for each offense.

In response to that portion of the ALJ ruling of October 29, 2014, requiring Vodafone US Ops to file a response to the impact proposed penalties under §§ 2107 and 2108 would have, on November 21, 2014, Vodafone US Ops filed confidential response opposing the imposition of financial penalties.

Vodafone US Ops provided services under the jurisdiction of this Commission and without authority to do so for 32 calendar months, beginning April 21, 2012, and ending November 30, 2014. As Vodafone US Ops had a good faith, albeit incorrect, belief that it did not need a CPCN, and as

Vodafone US Ops is no longer operating in California, only a minimum financial penalty of \$500 per occurrence is warranted. For the purposes of this Decision, an occurrence is defined as a calendar month during which Vodafone US Ops operated without authority. Vodafone US Ops should be liable for \$16,000 penalty under §§ 2107 and 2108, based on \$500 for the 32 calendar months it operated without authority.

#### **4. Safety Considerations**

This Application poses no safety considerations because the Applicant is no longer operating in California.

#### **5. Requests to File Under Seal**

Pursuant to Rule 11.4 of the Commission's Rules of Practice and Procedure, Vodafone US Ops has filed two motions for leave to file Exhibits C and D of its application under seal, as well as material filed on November 21, 2014 in response to ALJ Ruling. Vodafone US Ops represents that the exhibits and other filing contain sensitive financial information. We have granted similar requests in the past and do so here.

#### **6. Categorization and Need for Hearing**

On February 27, 2014, Resolution ALJ 176-3331 preliminarily categorized this proceeding as ratesetting and determined that no hearings are necessary. We confirm those preliminary determinations.

#### **7. Comments on Proposed Decision**

The proposed decision in this matter was mailed to the parties in accordance with § 311 of the Public Utilities Code and comments are allowed pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on \_\_\_\_\_, and reply comments were filed on \_\_\_\_\_ by \_\_\_\_\_.

**8. Assignment of Proceeding**

Michael Picker is the assigned Commissioner and Dan H. Burcham is the assigned ALJ in this proceeding.

**Findings of Fact**

1. Vodafone US Ops was a public utility while it was operating in California.
2. Vodafone US Ops provided regulated services subject to the Commission's jurisdiction.
3. Vodafone US Ops required a valid CPCN to provide regulated services in California.
4. Vodafone US Ops provided regulated services in California without valid operating authority from April 21, 2012 through November 30, 2014.
5. Vodafone US Ops discontinued operating in California as of December 1, 2014.
6. The Commission may impose penalties under Sections 2107 and 2108 for violation of statutes, regulations and rules of the Commission.
7. Vodafone US Ops has requested to file financial information under seal.

**Conclusions of Law**

1. Vodafone US Ops is a public utility subject to this Commission's jurisdiction.
2. The services provided by Vodafone US Ops formerly known as Cable & Wireless Americas Operations, Inc., are subject to this Commission's jurisdiction.
3. When Vodafone US Ops ceased operating in California as of December 1, 2014, its application for a CPCN became moot.
4. A penalty of \$16,000 is appropriate for operating without authority in California for a period of 32 calendar months.

5. Vodafone US Ops' motion to file under seal its Exhibits C and D and material filed on November 21, 2014 in response to an ALJ Ruling should be granted for three years.

## **O R D E R**

### **IT IS ORDERED** that:

1. The Application of Vodafone US Operations, Inc. for a certificate of public convenience and necessity is denied as moot because the company is no longer operating in California and has been dissolved.

2. Vodafone US Operations, Inc. is liable for a penalty under Pub. Util. Code sections 2107 and 2108 in the amount of \$16,000 for operating without authority for 32 calendar months.

3. Vodafone US Operations, Inc. must pay a fine of \$16,000 by check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102, within 30 days of the effective date of this order.

Write on the face of the check or money order "For deposit to the General Fund per Decision  ."

4. The Administrative Law Judge's ruling dated October 29, 2014, is affirmed.

5. The motion for reconsideration of the October 29, 2014 ruling is denied.

6. Vodafone US Operations Inc.'s (Vodafone US Ops) Motions to File Exhibits C and D of its application and material filed November 21, 2014 are granted for a period of three years after the effective date of this order. During this period, this information shall not be publicly disclosed except on further Commission order or Administrative Law Judge ruling. If Vodafone US Ops believes that it is necessary for this information remain under seal for longer than three years,



Vodafone US Ops may file a new motion showing good cause for extending this order by no later than 30 days before expiration of this order.

7. All outstanding motions not previously ruled on are hereby denied.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.